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Supreme Court of the United States

OCTOBER TERM 1966

No. 261

STEVEN L. RUSKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL C. WARREN, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, STEVEN L. RUSKIN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 18, 1966. (Appendix A, infra, p. A 1) An order, without opinion, denying petition for rehearing was entered on May 20, 1966, and also a judgment of the Court issued as and for an Order of stay of mandate for a period of thirty (30) days from May 20, 1966.

OPINIONS BELOW

There was no opinion in the District Court. The Per Curiam opinion of the Court of Appeals (Phillips, Senior Judge, and Jones and Brown, Circuit Judges) is reported in 358 F 2d 737 (5th Cir., 1966) and is printed for this Court's convenience at Appendix "A", infra, p. A 1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed herein was made and entered the 18th day of March, 1966, and a copy thereof is appended to this petition at Appendix A, infra p. A 1. The Per Curiam opinion of the Court, dated March 18, 1966, affirmed the District Court's judgment of conviction (R 69). The petition for rehearing was timely filed and was denied without opinion on May 20, 1966. An Order of stay of mandate was granted for thirty (30) days from May 20, 1966.

This petition is filed within thirty (30) days from the date of Order denying petition for rehearing.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, U.S.C.

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN AFFIRMING THE CONVICTION OF THE PETITIONER BY HOLDING THAT A TRIAL JUDGE IN A CRIMINAL CASE, SITTING WITHOUT A JURY, COULD INCONSIST-

ENTLY CONVICT PETITIONER, WHO WAS CHARGED WITH SEVERAL RELATED CRIMES, ON ONE COUNT AND ACQUIT HIM ON ALL OTHERS, ON EVIDENCE THAT LOGICALLY WOULD REQUIRE CONVICTION OR ACQUITTAL ON ALL COUNTS, CONTAINED IN A FIFTEEN-COUNT INDICTMENT?

CONFLICTING DECISIONS OF CIRCUIT COURTS OF APPEAL AND STATUTE INVOLVED

The denial of Petitioner's Appeal and the rehearing thereof by the United States Court of Appeals for the Fifth Circuit is in conflict with the decision of the United States Court of Appeals for the Second Circuit in the case of **United States v. Maybury** (2nd Cir. 1960) 274 F2d 899.

The Federal Statute involved is Section 371 of Title 18, U.S.C., which provides:

"Conspiracy

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years or both."

STATEMENT

The judgment of the Court of Appeals sought to be reviewed herein affirmed a judgment convicting the petitioner of one count of violating Title 18, Section 371, U.S.C.

The indictment (R 1) contained fifteen (15) counts; the first seven counts charged the petitioner and others with the fraudulent sale of securities, Title 15, Section 77 q(a), U.S.C.; counts eight through fourteen charged the petitioner and others with mail fraud, Title 18, Section 1341, U.S.C., and count fifteen, charged the petitioner with conspiracy to violate Title 15, Section 77 q(a), U.S.C. and Title 18, Section 1341, U.S.C. (as set out in counts one through fourteen) thereby violating Title 18, Section 371, U.S.C. The petitioner was tried by the trial judge, **without a jury**, and even though the trial judge found petitioner's co-Defendant guilty on various substantive counts with violating Title 15, Section 77 q(a), U.S.C., Title 18, Section 1341, U.S.C., and Title 18, Section 371, U.S.C., the same trial judge acquitted petitioner on the same evidence on counts one through fourteen, the substantive counts, but convicted petitioner on the conspiracy count. Petitioner was sentenced to three (3) years probation (R 69).

The gravamah of the reversible error was that the trial judge, sitting without a jury, on the same evidence which pertained to the substantive counts and to the conspiracy count, and upon which he convicted petitioner's co-defendant on both the substantive counts and the conspiracy count, acquitted petitioner of the substantive counts but, compromised the evidence in his own mind,

and convicted petitioner on the conspiracy count. In reality, all the evidence adduced at the trial was applicable to all counts of the indictment, and under the circumstances required the trial judge, **sitting without jury**, to either convict or acquit petitioner on all counts of the indictment.

The Court of Appeals affirmed the District Court, in a Per Curiam opinion (Appendix A, infra, p. A 1) and denied rehearing without rendering an opinion.

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING REASONS

The decision herein is in conflict with the decision of the Second Circuit in **United States v. Maybury** (2nd Cir. 1960) 274 F 2d, 899, where that court said that a trial judge, sitting in a criminal case, without benefit of jury, could not render an inconsistent verdict, convicting a defendant on one count of an indictment and acquitting him on another count of the indictment upon the same evidence adduced at the trial, where the necessary elements of both counts are irrevocably interwoven and related to each other.

In support of the foregoing, Petitioner would respectfully submit to this Court the following pertinent facts. Petitioner Ruskin was charged in a multi-count indictment (Counts I through VII, Fraudulent sale of securities, Title 15, Sect. 77q (a) U.S.C., Counts VIII through XIV, Mail Fraud, Title 18, Sect. 1341, U.S.C., and Count XV, Conspiracy, Title 18, Sect. 371, U.S.C.). Petitioner waived trial by jury and was tried by the Court without jury. Petitioner was tried with co-defendant Robert A.

McKee, whom the trial court found guilty as to Counts I through V, VII through IX, XI, XIV and XV of the same indictment.

At the trial, the transcript of testimony reflects that there was no separation of evidence or testimony, as to this Petitioner with respect to the individual counts contained in the indictment; that the same evidentiary matter was relied upon by the prosecution to try to prove Petitioner guilty of all fifteen counts of the indictment. In truth and fact, it was apparent that the prosecution, and the trial court itself, based the trial and conviction respectively of Petitioner on Count XV, (Conspiracy), Title 18, Sect. 371, U.S.C., and acquittal of Petitioner of the remaining fourteen counts of the indictment on the same evidentiary matter. Petitioner submits that the use of the same evidentiary material by the trial court leading to the acquittal of Petitioner of Counts I through XIV was inconsistent with the conviction of Petitioner, by the trial court, **without a jury**, of Count XV. Petitioner submits that this action falls squarely within the rule pronounced in **United States** v. **Maybury** (2nd Cir. 1960) 274 F 2d, 899 and that Petitioner's conviction must therefore be reversed.

Research reveals that the main line of argument, which the prosecution will contend is contra to the Petitioner's position, is derived from **Dunn** vs. **United States**, 1932, 284 US 390, 52 S. Ct. 189. This case decided in 1932, was argued by the prosecution in the **Maybury** case, supra. The court distinguished **Dunn** in arriving at its well reasoned holdings in **Maybury**. Petitioner submits that as **Dunn**, did not apply to **Maybury**, it likewise does not apply to the instant case. Further, the Sixth Circuit, in the

case of **Manley v. United States** (6th Cir. 1956) 238 F 2d 221 has rejected the theory set forth in **Dunn**. Petitioner submits that the rule set forth in **Maybury** is controlling in the case of this Petitioner, STEVEN L. RUSKIN.

The Court, in **Maybury**, has examined the background of jury verdicts in criminal cases despite an inconsistency as between counts of the indictment, and felt that the reasoning cited in **Dunn** was not applicable when a criminal case has been tried by a judge without jury. In its opinion the court said,

> "There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method for resolving doubts."
>
> **United States vs. Maybury**, Supra, 903.

Maybury was indicted on one count of forgery and one count of uttering a forged instrument. The appellate court, found that the trial court, in convicting **Maybury** of uttering a forged instrument and acquitting him of forgery, was inconsistent in its decision. It found that the trial judge must have based his conviction of Maybury on one count and acquittal of one count upon the same evidence adduced at the trial. The 2nd Circuit felt that the decision of the trial judge was merely a compromise on the part of the trial court. The rule set forth in **United States vs. Maybury**, supra, was held in **United States v. Sells** (2nd Cir. 1963) 325 F 2d 161, to apply also to inconsistent verdicts as between defendants tried together.

Petitioner would submit that since the advent of the decision in **United States v. Maybury**, supra, the rule cited therein has been the topic of several law review articles.

The inconsistency theory, as espoused in **Maybury**, comes into play,

> ". . . where a defendant charged with several related crimes was acquitted on some counts and convicted on others on evidence that logically would require conviction or acquittal on all."
>
> 1961 **Duke Law Journal**, 121, 138

> "The Court in Dunn seemed to think that the joinder of counts for the convenience of trial should confer on the defendant no greater rights than those he would have if the counts were tried separately. Since Sealfon v. United States, 332 U.S., 575 (1948) effectively prevents a conviction that is inconsistent with a prior acquittal, continued adherence to Dunn deprives the defendant of a right he would have if the counts had been tried separately." . . .
>
> "The underlying principle of Dunn suggests that the specific conclusion there reached should no longer be followed, so that a defendant in a multiple count trial will have rights equal to those of a defendant successively tried. It is not unlikely, therefore, in view of the Sealfon decision, and because of the failure of the consideration of jury leniency to provide any effective support for Dunn, that the Supreme Court will refuse to

adhere to that decision when the question is again presented."

60 **Columbia Law Review**, 999, 1009

To sum up the current law review opinions,

"It is submitted that the result in the instant case (Maybury) is sound and should be followed in all cases where trial is by the court without a jury. No reason exists in principle or authority to allow a trial judge to render an inconsistent verdict."

6 **Howard Law Journal**, 1960, p. 228

Subsequent to **Maybury**, supra, there have been no cases decided on the federal level putting forth the inconsistency theory, so thoroughly examined in Maybury, in connection with a multi-count indictment, where the trial was to the court sitting without a jury. However, the court, in **Johnson v. State**, 209 A 2d 765 (Maryland 1965) cited the **Maybury** rule, stating that it was the law in criminal prosecutions before a judge without a jury.

Petitioner would respectfully show that the identical basic elements were necessary if Ruskin were to be convicted of violating Title 15, Sect. 77q (a) U.S.C., (Counts I through VII of Indictment), Title 18, Sect. 1341, U.S.C., (Counts VIII through XIV of Indictment) and Title 18, Sect. 371, U.S.C. (Count XV of Indictment), to-wit: the willful knowing and intentional acts to violate the aforesaid portions of the United States Code.

As to Title 15, Sect. 77q (a) U.S.C., there must be a

willful and knowing intent to violate this section by entering into or perpetrating a scheme or device to defraud in the sale of securities.

As to Title 18, Sect. 1341, U.S.C., there must be a willful and knowing intent to violate this section by devising a scheme or device to defraud and to accomplish this by the use of the mails.

As to Title 18, Sect. 371 U.S.C., there must be a willful and knowing intent to violate this section of the United States Code based, upon a willful knowledge and intent to commit an offense against the United States, in the instant case, to violate Title 15, Sect. 77q(a) U.S.C., and Title 18, Sect. 1341, U.S.C.

> "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."

Ingram v. United States, 79 S Ct. 1314, 1319.

The common element is that there be a willful and knowing intent to devise, enter into a common scheme or device for the fraudulent sale of securities through the use of the mails.

Yet at the trial of the case, no distinction was drawn in the evidence as to this Petitioner's alleged violation of the specific code sections, which were incorporated in Count XV, and certainly, it must be conceded that logically, the trial court based his acquittal of Petitioner on Counts I through XIV on the same evidence that he

based his conviction of Petitioner upon Count XV. The action of the trial court in the instant case can only be summed up by again referring to **United States v. Maybury**, supra, where the court said,

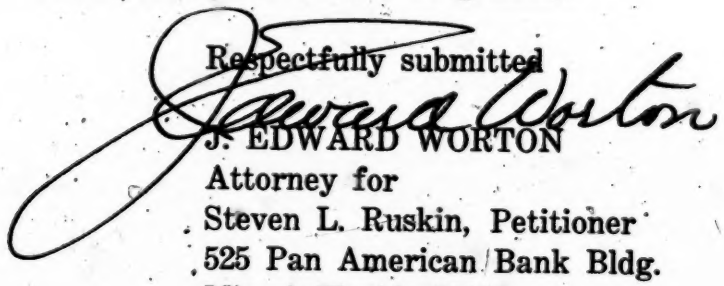
> " . .. we can have no confidence in a judgment convicting Maybury of one crime when the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here."
>
> **United States v. Maybury**, supra, 905.

It must be argued that the conviction of Petitioner of violating Count XV, Title 18, Sect. 371, U.S.C., was a compromise and thus falls squarely within the **Maybury** rule.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the required copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was on this 17th day of June, 1966, mailed to the Hon. William A. Meadows, United States Attorney for the Southern District of Florida, United States Courthouse, Miami, Florida; to the Solicitor General, Department of Justice, Washington 25, D. C.

J. EDWARD WORTON

J. Edward Worton

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22609

ROBERT A. McKEE and STEVEN L. RUSKIN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(March 18, 1966.)

Before PHILLIPS, Senior Judge,* and JONES and BROWN, Circuit Judges.

PER CURIAM: The appellant McKee contends that the offense of which he was convicted was a part of the same scheme and conspiracy of which he was acquitted in another trial under another indictment in the Southern District of Florida. There is no merit in this contention of former jeopardy.

The appellant Ruskin urges that the evidence was insufficient to warrant a conviction and that his motion for judgment of acquittal should have been sustained. We have no difficulty in reaching agreement with the district court that the evidence was fully adequate to sustain a conviction.

The judgments of the district court are

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22609

D. C. Docket No. 64-130 Cr.

ROBERT A. McKEE and STEVEN L. RUSKIN,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before PHILLIPS, Senior Judge,* and JONES and BROWN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

March 18, 1966

*Of the Tenth Circuit, sitting by designation.

Issued as Mandate:

U. S. COURT OF APPEALS
FILED
MAY 20 1966
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22609

ROBERT A. McKEE and STEVEN L. RUSKIN,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

Appeals from the United States District Court
for the Southern District of Florida

ON PETITIONS FOR REHEARING

(May 20, 1966)

Before PHILLIPS*, JONES and BROWN, Circuit Judges

PER CURIAM:

IT IS ORDERED That the petition of each of the appellants for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

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*of the Tenth Circuit, sitting by designation.